

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Abrams, Matheson, Ryan Bell, JJ.

BETWEEN:)
)
Manuel Fernandes) *John Syrtash*, for the Applicant (Respondent
) in Appeal
Applicant/Respondent in Appeal)
)
– and –)
)
Maryanna Darrigo)
) *Andrea L. Di Battista*, for the Respondent
Respondent/Appellant in Appeal) (Appellant in Appeal)
)
) **HEARD at Oshawa:** January 25, 2018

Matheson J.

[1] This is an appeal by Maryanna Darrigo from the orders of Douglas J. dated April 19 and May 29, 2017, ordering the sale of the matrimonial home prior to trial and related steps (the “Orders”).

Brief Background

[2] Manuel Fernandes and Maryanna Darrigo were married in 1998 and separated in October of 2013. Divorce proceedings were not commenced until 2016.

[3] The parties have three children. Their youngest son, Manuel Jr., has been diagnosed with Autism Spectrum Disorder, and has had symptoms of depression and anxiety from early childhood. He is now 15 years old.

[4] The parties’ jointly-owned matrimonial home is in King City, Ontario. Under an informal arrangement, the appellant mother and Manuel Jr. have continued to live in the matrimonial home since the separation.

[5] There are disputes between the parties about a myriad of issues including each side’s financial disclosure and steps allegedly taken by the respondent to prevent the appellant from

accessing joint funds that were otherwise available and were needed to pay the property tax on the matrimonial home. The divorce proceedings have not yet gone to trial.

[6] In the appellant's Answer in the divorce proceedings she seeks, among other things, exclusive possession of the matrimonial home and a vesting order for the matrimonial home.

[7] By notice of motion dated March 20, 2017, the respondent sought the immediate listing and sale of the matrimonial home and related orders. The motion was returnable April 5, 2017 and decided April 19, 2017, giving rise to the Orders. The respondent alleged that the appellant was negligent regarding the property and the delay was prejudicing his ability to enter the Toronto real estate market.

[8] The motion judge noted that where substantive rights in relation to jointly held property are likely to be jeopardized by an order for sale, the matter should be deferred until the issues are decided under the *Family Law Act*. He further noted that prejudice to either spouse's claims was a reason to delay the sale. However, he ordered the sale.

[9] At the forefront of the appellant's alleged prejudice is the potential negative impact on Manuel Jr. The appellant submitted to the motion judge that it was contrary to the child's best interests to sell the matrimonial home given that he is autistic and has related special needs. The motion judge noted her evidence and noted that some related medical letters had been filed regarding the child's health difficulties. The motion judge then found as follows as regards the evidence about the impact on the child:

The letters filed as Exhibits to the [appellant's] affidavit are unsworn and have not been proffered as proper expert evidence within the meaning of the *Family Law Rules*. Accordingly they cannot be relied upon as anything stronger than the source of the [appellant's] stated information and belief. As a result little weight can be attached to this evidence. [Emphasis added.]

[10] The motion judge went on to conclude that a possible remedy to address the appellant's concern "may be to delay any possible closing of a sale transaction sufficiently to allow the [appellant] to prepare the child for the move, assuming such is necessary." However, the motion judge ordered that unless the parties agreed otherwise, within 14 days after the respondent provided his updated and sworn financial statement and completed answers to undertakings given on questioning, the matrimonial house would be listed for sale and the first commercially reasonable offer accepted.

Fresh evidence motion

[11] The appellant brought a fresh evidence motion, which was heard and granted at the outset of the hearing of this appeal. The fresh evidence is an expert report from Dr. Carol Steinberg, Clin. Psy. D., in which she opines, among other things, on the impact on Manuel Jr. if he is required to move from his childhood home. She opines that moving residences would be a high-level stressor for the child, and cause an increase in anxiety and depression at a time when the child had only recently expressed less depressive moods.

[12] In order for the court to discharge its obligation to consider the best interests of children, the rules governing the admission of fresh evidence in an appeal that are otherwise set out in *R. v. Palmer*, [1980] 1 S.C.R. 759, are relaxed: *Salehi v. Tawoosi*, 2016 ONCA 986, at para. 21.

[13] This expert report was requested in a timely way in advance of the hearing of the motion, but not received in time for the hearing. It is dated April 23, 2017, four days after the April 19th Order was made.

[14] On the fresh evidence motion, the respondent submitted that the report, with due diligence, could have been adduced in time for the motion. However, the time lines were relatively short in relation to the preparation of an expert report.

[15] The lack of expert evidence turned out to be important to the decision, as specifically noted by the motion judge, and can reasonably be expected to have affected the result. The evidence is also credible, coming from a qualified expert witness. The respondent submitted that the report was prepared for another purpose because it also addresses the issue of whether there should be an assessment and attempt to develop a relationship between the child and the respondent father. That the report serves more than one purpose does not defeat this motion.

[16] Bearing in mind that the leave criteria are relaxed because this evidence relates to the best interests of the child Manuel Jr., the motion to introduce this fresh evidence was granted.

Analysis

[17] Although a number of issues were raised on the appeal, only one issue must be addressed to dispose of the appeal. That issue is whether the motion judge erred in granting the motion for the sale of the matrimonial home before trial given the potential for prejudice to the best interests of Manuel Jr. and related claims by the appellant for possession and a vesting order.

[18] The parties agree that the standard of review is as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Here, the issue is one of mixed fact and law. For questions of mixed law and fact, the standard varies. Where a legal principle can be extracted from the question of mixed law and fact, the standard for that question is correctness. Where the issue is the application of correct legal principles to the facts, the standard is palpable and overriding error. In this case, the applicable standard is palpable and overriding error.

[19] There was substantial evidence about Manuel Jr. before the motion judge from the appellant mother that was uncontradicted by the respondent father. As well, the respondent said in questioning that the appellant was the best source of advice about the child. The respondent has no relationship with the child. There were also medical letters, but little weight was put on them given the absence of proper expert evidence. Given the fresh evidence, there is now supporting expert evidence.

[20] This evidence, taken together, presents a cohesive foundation for the conclusion that it is not in the best interests of the child to order the sale of the matrimonial home at this stage, and there is certainly the reasonable prospect that to do so would prejudice the health of the child. The evidence establishes a significant long-existing health challenge arising from autism, if not

other conditions as well. The evidence shows that the idea of moving from his childhood home would generate increased anxiety and depression for Manuel Jr. who has only recently shown some improvement. If the house is sold now, that prejudice cannot be undone. However, the issue of the sale of the matrimonial home and the needs of Manuel Jr. can still be raised by the respondent at trial for determination at that time.

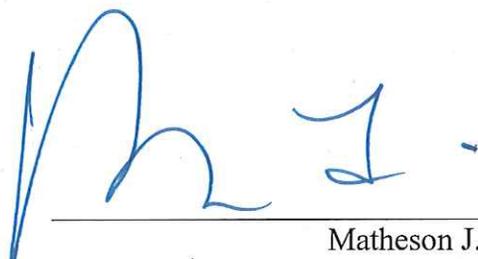
[21] As acknowledged by the motion judge, orders directing the sale of the matrimonial home before the resolution of the *Family Law Act* claims should not be made as a matter of course. Here, the appellant has sought both exclusive possession of the matrimonial home and a vesting order for the matrimonial home, both of which relate to the interests of Manuel Jr. The effect of the Orders is to defeat those claims before trial.

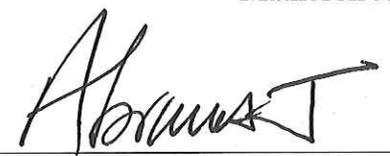
[22] Based upon the fresh evidence, there was palpable and overriding error in considering the best interests of Manuel Jr. and related prejudice, and the Orders should therefore be set aside.

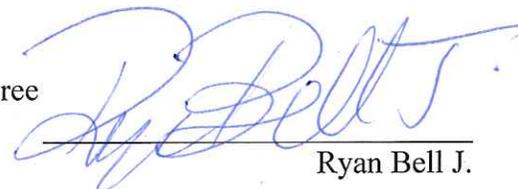
Disposition of appeal

[23] The appeal is therefore granted and the Orders set aside.

[24] In accordance with the agreement between the parties, the respondent shall pay costs to the appellant fixed at \$15,000 all inclusive.


Matheson J.

I agree 
Abrams J.

I agree 
Ryan Bell J.

Date of Release: February 12, 2018

CITATION: *Fernandes v. Darrigo*, 2018 ONSC 1039
DIVISIONAL COURT FILE NO.: DC 1022/17
DATE: 20180212

ONTARIO
SUPERIOR COURT OF JUSTICE
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Abrams, Matheson, Ryan Bell, JJ.

BETWEEN:

Manuel Fernandes

Applicant/Respondent in Appeal

– and –

Maryanna Darrigo

Respondent/Appellant in Appeal

REASONS FOR DECISION

Matheson J.

Date of Release: February 12, 2018